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IN THE

Supreme Court of the United States

....., Term 1966

No. 1129 89

ROY WALKER,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Roy Walker prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for The Fourth Circuit entered in the above-case on December 22, 1965.

OPINION BELOW

The Opinion of the District Court for the Western District of North Carolina (Appellant's App. I A-17 and Appellee's App. II 1), is reported in 237 F. Supp. 278. The Opinion of the Court of Appeals for the Fourth Circuit (R. 11, 45), is not yet reported.

JURISDICTION

The Judgments of the Court of Appeals for the Fourth Circuit were made and entered on December 22, 1965 (R. 18, 52), and copies thereof are attached to this Petition in the Appendix at pp. 1-11. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Roy Walker was employed by Respondent Southern Railway Company in the early 1940's and worked for it until his seniority was taken on May 28, 1957, at twelve o'clock midnight.

The facts leading up to Petitioner's dismissal are as follows:

Petitioner was informed by crew clerk on March 3, 1957, that he had been "rolled for a regular job." This meant in railroad parlance, that a man with greater seniority had taken over his job. Petitioner then informed the crew clerk that he was sick and was going home. Upon his arrival at home he became seriously ill, underwent an operation and caused a call to be made to the yardmaster in Charlotte, North Carolina, telling him that he was sick and could not work. Petitioner also obtained a doctor's certificate to the effect that he was unable to work and sent it to Mr. Edward R. Brinkley, Respondent's Terminal Trainmaster, on May 11, 1957. Petitioner had previously seen Mr. Brinkley about April 9, 1957, and told him verbally that because of an operation and adhesions he was unable to work.

On April 29, 1957, the railroad wrote him that, "You stand for work on your seniority and unless you protect your seniority within thirty days from the date of this letter, you will have forfeited your seniority." This letter was signed for by Petitioner's daughter on April 30, 1957.

Petitioner Roy Walker had not heard from Respondent Southern Railway Company and became worried about his position. On the 29th day of May, 1957, at about eleven o'clock a.m., Petitioner Roy Walker went to the Charlotte Office of Respondent Southern Railway Company in order to inform them of his illness. When Petitioner arrived there he was shown a message pinned to the Call Book stating that he would not be allowed to work under any circumstances; that he had forfeited his seniority at midnight on May 28, 1957. This order was signed by J. R. Brosnan, Division Superintendent. Petitioner Roy Walker then went to Greenville, South Carolina, to see Mr. Brosnam who refused to give him any consideration or to reinstate him. Petitioner Roy Walker then filed suit for wrongful discharge. The District Court for the Western District of North Carolina held that Petitioner Roy Walker, by reporting on May 29, 1957, had reported within the thirty days' period and that his discharge was wrongful.

The Court than awarded damages for wrongful discharge. Respondent Southern Railway Company then appealed to the Circuit Court for the Fourth Circuit and shortly after the appeal was entered this Court decided *Republic Steel Corporation* v. *Maddox*.

In its opinion the Circuit Court held that, "At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the Collective Bargaining Agreement when, as here, the employee asked money damages only and not reinstatement."

The Circuit Court then went on to hold that since the *Maddox* decision this rule no longer obtained and that Petitioner Roy Walker was not entitled to bring suit for wrongful discharge until he had first exhausted his administrative remedies under the Contract.

The Questions presented are:

1. Did Petitioner Roy Walker, have a right to bring suit against the Southern Railway Company for his wrongful discharge on May 28, 1957, when he asked for money damages only and when he had not first pursued any administrative remedy under the contract or filed any petition for review with the National Railway Adjustment Board?

2. If Petitioner Roy Walker had such a right, did the District Court, on January 16, 1965, have a right to enter Judgment in his favor when he had not first pursued any Administrative Remedy under the contract and had not filed any Petition for review with the National Railroad Adjustment Board?

3. If, Petitioner Roy Walker, had a right to bring the suit and if the District Court had a right to enter Judgment for him on January 16, 1965, then, did the opinion of this Court in *Republic Steel Corporation* v. *Maddox*, 379 U. S. 650 (1965), which was decided January 25, 1965 (eight days after the opinion of the District Court in the instant case), destroy Petitioner Roy Walker's right to sue the Southern Railway Company and the District Court's right to enter Judgment for him?

4. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to suits under the Railway Labor Act when the Labor Management Relations Act, under which *Maddox* was decided, specifically states that it does not apply to actions under the Railway Labor Act (Title 29 U.S.C.A., section 182).

5. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to the instant case when *Maddox* was a suit for severance pay and the instant case is one for money damages by reason of wrongful discharge?

6. Do the Administrative Remedies under the Railway Labor Act provide a wrongfully discharged employee with the same redress and the same remedies he can obtain by bringing his suit at law for money damages for wrongful discharge?

7. Does the opinion of this Court in *Republic Steel Corporation* v. *Maddox* require that Federal Law and not State Law be applied to all suits by Railroad employees against Railroads for wrongful discharge when those suits ask for money damages only?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

Title 29 U.S.C.A. section 182

Title 28 U.S.C.A. section 1254(1)

STATEMENT

Petitioner Roy Walker was discharged by Respondent Southern Railway Company on May 28, 1957. He later brought suit in the Superior Court of Rutherford County, North Carolina, alleging wrongful discharge. Respondent Southern Railway Company filed a petition to remove the case to the United States District Court for the Western District of North Carolina on the grounds of the amount involved and diversity of citizenship. This motion was granted and the cause removed to the District Court for the Western District of North Carolina.

Shortly thereafter at a pre-trial conference Peitioner voluntarily dismissed that part of his complaint in which he had asked for reinstatement in addition to monetary damages thus leaving only a suit against Respondent Southern Railway Company for money damages by reason of his wrongful discharge.

The cause came on for trial without a jury before Craven, Chief Judge.

At the trial it was stipulated that Petitioner Roy Walker had not exhausted his administrative remedies or filed any petition with the National Railway Adjustment Board before bringing suit for wrongful discharge.

As the trial progressed Petitioner Roy Walker's evidence showed that he had been employed by Respondent Southern Railway Company from the early 1940's until May 28, 1957. The evidence further showed that Petitioner Roy Walker was informed by a crew clerk on March 3, 1957, that he had been "rolled for a regular job." This meant in railroad parlance that a man with greater seniority had taken over his job.

Petitioner Roy Walker went home and was sick for sometime. He caused a call to be made to the yardmaster telling him that he was sick and could not work and obtained a doctor's certificate from Dr. T. R. Harris to the effect that he was unable to work and sent it to Mr. Edward R. Brinkley, Southern Railway Company Terminal Trainmaster, on May 11, 1957. Petitioner Roy Walker had previously seen Mr. Brinkley about April 9, 1957, and told him that because of an operation and adhesions he was unable to work.

On April 29, 1957, a letter was sent, certified mail, by Respondent Southern Railway Company's Superintendent to Mr. Walker and was signed for by Petitioner Walker's daughter on April 30, 1957. This letter advised Petitioner Walker to protect his seniority within thirty days from the date of that letter or he would forfeit it. Accordingly Petitioner Roy Walker reported to Charlottee on the 29th day of May, 1957, about eleven o'clock a.m. in order to protect his seniority. When Petitioner arrived he was shown a

message pinned to the Call Book stating that he would not be allowed to work under any circumstances, that he had forfeited his seniority at midnight on May 28, 1957. This was authorized and signed by J. R. Brosnan Division Superintendent. Petitioner Walker then went to Greenville, South Carolina, to try to explain to Mr. Brosnan that he was sick but Mr. Brosnan refused to give him any consideration and informed him that he was discharged. Petitioner Walker contended that he had protected his seniority within the allotted time and Respondent Southern Railway Company contended that in order to protect his seniority he should have reported by midnight May 28, 1957.

At the trial it was stipulated by Petitioner Walker that he had not exhausted his administrative remedies before commencing suit.

On January 16, 1965, the District Court rendered a decision in favor of Petitioner Roy Walker and granted him damages in the amount of $4500.00.

In reaching this decision the District Court held that Petitioner Roy Walker was not required to exhaust his administrative remedies or file a petition with the National Railroad Adjustment Board before bringing suit because his rights in this regard were governed by the North Caroline Law and that Law did not require exhaustion of administrative remedies or petition to the National Railroad Adjustment Board before bringing suit when claimant sought only money damages.

The District Court further held that Petitioner Roy Walker had protected his seniority by reporting within the thirty days and that his discharge was wrongful.

Respondent Southern Railway Company gave notice of appeal to the Fourth Circuit and on January 25, 1965, this Court decided *Republic Steel Corporation* v. *Maddox*. The

instant case was later heard by the Fourth Circuit on November 3, 1965; and on December 22, 1965, Albert V. Bryan, Circuit Judge of the Fourth Circuit, rendered a decision for the Circuit reversing the District Court, vacating the Judgment, and ordering the case remanded to the District Court for dismissal.

The basis for the Circuit Court's decision was that *Republic Steel Corporation* v. *Maddox* required that a railroad employee must exhaust his administrative remedies both under the Collective Bargaining Agreement and before the National Railroad Adjustment Board prior to suit and completely ignored the question of whether or not the State Law of the Contract required such an exhaustion of remedies before suit.

The Circuit Court reached this decision in spite of the fact that this Court in the *Maddox* case specifically stated that, ". . . by refusing to extend *Moore* v. *Illinois Central RR. Co.*, to section 301 suits, we do not mean to overrule it within the field of the Railway Labor Act."

REASONS FOR GRANTING THE WRIT

The Fourth Circuit held that Petitioner Roy Walker whom the District Court found had been wrongfully discharged by Respondent Southern Railway Company could not bring suit for such wrongful discharge even though he asked for money damages only, until he had; *first:* exhausted the administrative remedies provided for in the Collective Bargaining Agreement; and, *second:* filed a petition for a review with the National Railroad Adjustment Board in the event the administrative decision was adverse to hm.

This decision of the Fourth Circuit is in conflict with the following decisions of this Court. In *Moore* v. *Illinois Cen-*

tral Rly. Co., 312 U. S. 630, 61 Supreme Court 754, 85 L. Ed. 1089 (1941). This Court held that a Railroad employee was not required to exhaust his administrative remedies under the contract or file a petition with the National Railroad Adjustment Board before instituting in Court a suit for wrongful discharge in which he asked for money damages only. Justice Black made the position of this Court very plain when he said on Page 634 of the U. S. and on Page 756 of the Sup. Ct.:

> "But RESPONDENT says there is another reason why the Judgment in its favor should be sustained. This reason according to Respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold. Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted to him by the Railway Labor Act. . . . But we find nothing in that act which purports to take away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a pre-requisite to filing a suit in Court. . . ."

and on page 636 of the U. S. Justice Black continued . . .

> "The District Court and the Circuit Court of Appeals properly decided that Petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the Railroad as a pre-requisite to suit for wrongful discharge. . . ."

The above decision was re-examined and approved in the case of *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 Sup. Ct. 577, 94 L. Ed. 795.

Where Justice Black again speaking for the Court says on Page 244 of the U S.:

"Our holding here is not inconsistent with our holding in Moore v. Illinois Central RR. Co., 312 U.S. 630, 85 L. Ed. 1089, 61 Sup. Ct., 754. Moore was discharged by the Railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar Courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."

Also, in *Transcontinental and Westernaire* v. *Koppal,* 345 U. S. 653, 73 Sup. Ct. 906, 97 L. 1325 (1953), this Court reiterated its position that the Railway Labor Act did not require exhaustion of Remedies or Petition to the National Railroad Adjustment Board before suit and in addition thereto stated in specific terms that whether or not such remedies had to be exhausted before wrongful discharge suit for money damages depended on the applicable State law. Justice Burton, speaking for the Court, said on Page 661 of the U. S. and Page 1330 of the L. Ed.:

"The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum case. That Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged, such an employee may proceed either in accordance with the Administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the *State Courts recog-*

nize such a claim (Italics ours), where the applicable law permits his recovery of damages without showing his prior exhaustion of his remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi Law.

"On the other hand if the applicable local law, as is Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier subject to Title Two of the Railway Labor Act, and his employment contract contained many administrative steps for his release, all of which were consistent with the act. Accordingly, while he was free to resort to the Courts for relief, he was there required by the law of Missouri to show that he had exhausted the varied administrative procedures contemplated by the Railway Labor Act. In the instant case he was not able to do so and his complaint was properly dismissed."

The Circuit Court recognized that the *Moore, Slocum* and *Koppal* cases decided by this Court clearly permitted the instant suit at the time it was brought and at the time the Judgment of the District Court was rendered. This is clearly shown by the following language in the opinion of the Circuit Court:

"At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the Collective Bargainning Agreement, when, as here, the employee asked money damages only and not reinstatement. Transcontinental and Westernaire Inc. v. Koppal, 345 US 653 (1953); Slocum v. Delaware & W. RR., 339 US 239 (1950); Moore v. Illinois Central RR., 312 US 630 (1941)."

After recognizing this fact the Circuit Court nevertheless then came to the conclusion that the decision of this Court in *Republic Steel Corporation* v. *Maddox* required the Circuit Court to ignore *Moore, Slocum,* and *Koppal,* and, in effect, overrule them when this Court in the *Maddox* opinion had expressly declined to do so. This is shown by the following language in the Circuit Court's decision:

> "But closely following the entree of Judgment in this action the Supreme Court decided Republic Steel Corp. v. Maddox, 379 US 650 (1965), although the case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the Collective Bargaining Agreement and before the Adjustment Board prior to suit. Cf. Neal v. System Board of Adjustment 349 F. 2d 722, 727 (8 Cir. 1965). [This citation is incorrect—should be 348 F. 2d 722, 727.]
>
> "'Specifically Maddox denied judicial recourse to the discharged employee until he had attempted use of the contract grievance procedure agreed upon by employee and union as the mode of redress.' (Accent added) True, the opinion observed that the Court did not mean to overrule Moore v. Illinois Central RR., supra, 312 US 630, 'Within the field of the Railway Labor Act,' 379 US at 657, fn. 14; but the ratio decidendi embraces the instant controversy."

Thus the decision of the Fourth Circuit in this case is in direct conflict with the following opinions of this Court. *Moore* v. *Illinois Central RR. Co.*, 312 US 630, 85 L. Ed., 1089, 61 Sup. Ct., 754 (1941); *Slocum* v. *Delaware, L. & W. RR. Co.*, 339 US 239, 70 Sup. Ct., 577, 94 L. Ed., 795 (1950); *Transcontinental & Westernaire, Inc.* v. *Koppal*, 345 US 653, 73 Sup. Ct. 906, 97 L. Ed. 1325 (1953).

CONCLUSION

It is, therefore, quite apparent that the decision of the Fourth Circuit is in conflict with the decisions of this Court in the particulars set out above and this Court should allow this Petition for Certiorari in order to make it clear whether or not the Federal Law requires a railroad employee to exhaust his administrative remedies and petition the National Railroad Adjustment Board before bringing suit for wrongful discharge; and, if not, whether the State Law of the Contract or the Federal Law must be consulted to determine whether or not such remedies must be exhausted before suit.

Respectfully submitted,

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APPENDIX

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Judgment, dated January 18, 1965

CRAVEN, Chief Judge:

This is an action by Roy Walker to recover damages for breach of his employment contract with the Southern Railway Company. Originally filed in the Rutherford County Superior Court on August 15, 1963, it was removed on petition of Southern, by reason of diversity of citizenship, to this court.

Until his discharge as of 12:00 midnight, May 28, 1957,[1] Walker had been in Southern's employ approximately thirteen years, the latter portion of which he worked as a fireman.

On March 3, 1957, Walker was notified by a crew clerk for Southern that he had been "rolled for a regular job". In less colloquial language this means that Walker was displaced on his job by another fireman because of the latter's higher seniority. Walker then left, saying that he was sick and was going home.

By letter dated April 29, 1957, Walker was informed by J. R. Brosnan, Southern's Division Superintendent, that unless he "protected" his seniority within 30 days from the date of the letter his seniority would be forfeited. A postal certificate shows that the letter was received and signed for by Walker's daughter-in-law on April 30, 1957. Walker was in the Gardner-Webb Medical Clinic recuperating from an operation, and did not actually see the letter until May 2, 1957.

As of midnight on May 28, 1957, Southern treated Walker's seniority as having been forfeited. The next day (May 29th) Walker appeared at the office of Southern in Charlotte seeking to protect his seniority, but was told that

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[1] Defendant has not pleaded any statute of limitations. Fed. R. Civ. P. (8).

he had already lost it. Walker subsequently traveled to Greenville, South Carolina, to ask Mr. Brosnan to reinstate him. Reinstatement was denied, whereupon this suit to recover damages for breach of contract was instituted.[2]

JURISDICTION

If a discharged railroad employee elects to seek reinstatement (with or without back pay), the National Railroad Adjustment Board has primary jurisdiction to the exclusion of both state and federal courts. But if the employee accepts his discharge as final, and such is the situation here, he may bring an action at law for damages. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950); *Moore* v. *Illinois Central R. R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941).

Walker did not exhaust administrative remedies available to him under the collective bargaining agreement between Southern and the Union. Southern not unreasonably contends that his failure to do so bars this action, and that exclusive jurisdiction is in the National Railway Adjustment Board. Whether he must show that he has exhausted his administrative remedies under the contract depends upon the applicable state law. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953).

In *Haynes* v. *Winston-Salem Southbound Ry. Co.*, 252 N.C. 391, 113 S.E. 2d 906 (1960), the North Carolina Supreme Court held that a railroad employee who accepts his discharge as final and brings an action to recover damages for breach of contract is not required to exhaust his administrative remedies before maintaining the action. Southern, in its brief, cites *Charlotte City Coach Lines, Inc.*

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[2] Walker originally sought reinstatement also. That part of the complaint has been dismissed.

v. *Brotherhood of Railroad Trainmen,* 254 N.C. 60, 118 S.E. 2d 37 (1961), for the proposition that North Carolina law *does* require exhaustion of administrative remedies before maintaining an action for breach of contract.

The *Charlotte* case was decided after *Haynes,* but they are clearly distinguishable. *Charlotte* was a suit between an employer and a labor union; the court was primarily concerned with the interpretation of a North Carolina statute providing for *arbitration* of employee grievances. In that case the employee, over whom the dispute arose, was *suspended* from his regular job as a passenger bus driver. He was not discharged.

BREACH OF CONTRACT

Coming to the merits, Walker was discharged for one reason only: his alleged failure to "return to actual service" or report for work prior to the expiration of the 30-day limitation period.[3]

Walker informally notified Southern of his illness and inability to work by having his daughter telephone Southern's yard office in Charlotte on March 7, 1957. Again, on April 9, 1957, Walker, accompanied by his daughter and George Padgett, went to Southern's terminal station in Charlotte to pick up a salary check due him. While there, he told Edward Brinkley, Southern's "Trainmaster", that he was unable to work because of an operation and adhesions.

But, regardless of the effect, if any, of such informal notification, Walker contends that under no circumstances was Southern entitled to take his seniority away from him before the 29th of May, 1957, and the fact that it did so

[3] It was assumed at the trial, perhaps because of the employment contract, that the discharge was unlawful if Walker reported for work within 30 days of the notice. The trial proceeded on this premise.

was a violation of his contract. Walker would count the 30-day period from the 29th of April to the 29th of May, i.e., exclude the first day and include the last day.

Southern contends that the proper method of counting the 30-day period is to include the first day (the day the letter was written) and exclude the last day, thereby making the termination date fall on May 28, 1957.

The contractual provision setting forth the 30-day limitation period is silent as to how the period is to be counted.[4] According to Southern, it has not been interpreted in any judicial or administrative proceeding, nor has it been necessary to do so until now.

Southern officials who testified indicated that the customary practice of the railroad was to include the first and exclude the last day, and that the Union was not opposed to such practice. But there was evidence to the contrary. Southern contention is weakened by its admission that never before has time computation been of great importance. Common usage is not established.

Although there is no uniform rule of computing time with respect to the inclusion and exclusion of terminal days, the majority rule is that the time within which an act is to be done is to be computed by excluding the first day and including the last day. 85 C.J.S. 849, "Time" Section 13(1), (3), (7). North Carolina is in accord with this rule.[5] So is

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[4] The provision appears in a handbook titled: *SCHEDULE OF WAGES and RULES AND REGULATIONS for Firemen, Hostlers and Outside Hostler Helpers.* Article 25(c)(3) provides: "When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required."

[5] N.C.G.S. 1-593 provides: "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

the federal practice. *In re Schmidt,* 54 F. Supp. 262 (D.C. Neb. 1944); See Fed. R. Civ. P. (6).

Walker reported for work on May 29, 1957. It is adjudged that this was the last day of the 30-day period within which he was required to report. Southern's forfeiture of his seniority as of May 28, 1957, was, therefore, unlawful and constituted a violation of his contract.

Under North Carolina law the measure of damages for wrongful discharge from employment is the actual damage sustained on account of the breach.[6] "The maximum amount recoverable is the difference, if any, between the agreed compensation and the amount the employee earned or by reasonable effort could earn during the contract period." *Thomas* v. *College,* 248 N.C. 609, 104 S.E. 2d 175 (1958).

"Back pay" is a proper element of the measure of damages in actions for breach of contract of railroad employment. *Mackey* v. *Union Terminal Co.,* 321 F. 2d 901 (5th Cir. 1963); *Air Line Dispatchers Association* v. *California Eastern Airways,* 127 F. Supp. 521 (D.C. Calif. 1954); *Cook* v. *Des Moines Union Ry. Co.,* 16 F. Supp. 810 (S.D. Iowa 1936). But Walker has no contractual basis for claiming lost wages as damages *beyond* the date of this judgment. *Shiels* v. *Baltimore & Ohio R. R. Co.,* 154 F. Supp. 917, 926 (S.D. Ind. 1957).

Moreover, Walker had the duty to mitigate damages, or, put more accurately, his damages are limited to the extent he could have reasonably mitigated them and failed to do so.

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[6] No evidence was offered at the trial bearing upon measure of damages. Sometimes employment contracts provide severance pay in event of discharge. Exhibit D has no such provision, nor does it even disclose the duration of the employment contract—itself a damage limitation. See: *Marranzano* v. *Biggs,* 213 F. 2d 196 (D.C. Cir. 1954): *Enterprise Wheel & Car Corp.* v. *United Steelworkers of America,* 269 F. 2d 327 (4th Cir. 1959).

That is, one injured by the breach will be allowed to recover from the other party only such damages as he could not with reasonable effort have avoided. *Troitino* v. *Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945).

When Walker was discharged in 1957, he was 52 years old and had been working for the railroad about thirteen years. The most he had ever earned was $3,321.74 in 1956. In 1955 he earned $2,291.60, in 1954 $1,040.88, in 1953 $1,356.24, in 1952 $2,803.69, in 1951 $856.94, and in 1950 $551.24. The years prior to that follow a similar income pattern.

It is not easy to seek new employment at the age of 52, but it is not impossible to do it successfully. No evidence was offered in the trial of this case tending to show that Walker made the effort. Walker's appearance and personality is pleasing. He does not appear to be sick, and no evidence was offered tending to show that he has been so ill as to be unable to work since 1957. In my judgment, Walker could have successfully sought other employment and have earned a minimum of approximately $50.00 a week, or $2,400.00 per annum. It is doubtful, in view of his work record, that he would have earned substantially more than that amount had he been permitted to continue in his employment with Southern Railway. But the last year (1956) is much more significant than the prior ones. Considering the average income, but weighting the average heavily in favor of the last full year (1956), I draw the inference and find as a fact that but for his wrongful discharge Walker would have earned approximately $3,000.00 per annum as a fireman for the Southern Railway from date of discharge until now. It has now been more than seven and less than eight years since his discharge, and he has lost approximately $600.00 per year. I find that Walker has

been damaged in the amount of $4,500.00 by reason of wrongful termination of his employment.[7]

There is no evidence whatsoever to support the prayer for punitive damages, and the court fails and refuses to find that Walker is entitled to recover punitive damages.

It is adjudged that Walker has been damaged in the total sum of $4,500.00. Judgment will be entered that he have and recover of Southern that amount.

This 16th day of January, 1965.

/s/ .....

J. BRAXTON CRAVEN, JR., *Chief Judge United States District Court For The Western District Of North Carolina*

Judgment dated December 22, 1965

ALBERT V. BRYAN, Circuit Judge:

Roy Walker, a fireman on the Southern Railway Company, may recover damages of $4500 from the railroad, the District Court has held, for terminating his seniority, as a result of which he was not allowed to work. The assessment was based on the finding that it was a discharge in violation of the collective bargaining agreement between the railroad and his union. Both Walker and Southern appeal.

The facts are simple. Reporting for work on March 3, 1957 Walker found he had been displaced in his job by a fireman with superior seniority. Whereupon he told the crew clerk he was sick and was going home. According to his testimony he kept the officials apprised of his continued

[7] It is unnecessary to decide whether lost fringe benefits, e.g., retirement and disability compensation, etc., should be considered as damage elements for the reason that no evidence was offered to show the value of same, nor even to show that such benefits were lost.

illness and inability to work. On April 29, 1957 the railroad wrote him that "you stand for work on your seniority and unless you protect your seniority within 30 days from the date of this letter, you will have forfeited your seniority". Authority for the 30-day stipulation was the collective bargaining agreement. As of May 28, 1957 at midnight the Southern cancelled his seniority, holding ineffective—as a day beyond the 30 days—his appearance on May 29 to preserve his seniority. However, the Court upheld Walker's contention that a correct counting of the 30 days gave him until May 29 to prevent the forfeiture.

The railroad now contends that the District Court was without jurisdiction because the complainant had not first exhausted the grievance procedures provided in the collective bargaining agreement and the privilege of a review by the National Railroad Adjustment Board under the Railway Labor Act, 45 USC 151, 153(i). The employee assigns as error mitigation by the Court of his damages, saying there was no evidence disclosing other earning opportunities open to him after leaving the Southern.

We must sustain the railroad's appeal. At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the collective agreement when, as here, the employee asked money damages only and not reinstatement. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 US 653 (1953); *Slocum* v. *Delaware, L. & W. RR.*, 339 US 239 (1950); *Moore* v. *Illinois Central RR.*, 312 US 630 (1941). But closely following the entry of judgment in this action, the Supreme Court decided *Republic Steel Corp.* v. *Maddox*, 379 US 650 (1965). Although that case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the collective bargaining agreement and before the Adjustment

Board prior to suit. Cf. *Neal* v. *System Board of Adjustment*, 349 F2d 722, 727 (8 Cir. 1965).

Specifically, *Maddox* denied judicial recourse to the discharged employee until he had "attempt[ed] use of the *contract* grievance procedure agreed upon by employer and union as the mode of redress." (Accent added.) True, the opinion observed that the Court did not mean to overrule *Moore* v. *Illinois Central RR., supra*, 312 US 630 "within the field of the Railway Labor Act", 379 US at 657, fn. 14; but the ratio decidendi embraces the instant controversy.

The next question, presently, is whether the influence of *Maddox* also compels the railroad employee to take advantage of a review by the Railroad Adjustment Board. There the question was, of course, not expressly before the Court, but it is before us if Walker is to be saved from further court litigation. On the basis of the *Maddox* decision we hold that, if the employee does not prevail on the contract remedies, then before instituting a lawsuit he must petition review by the National Railroad Adjustment Board. 45 USC 153(i). See *Beebe* v. *Union RR.*, 208 A2d 16 (Pa. Super. Ct. 1965).

The Board was obviously created to answer just the type of complaint now before us. The admonishment of the Railway Labor Act, *supra*, 45 USC 152 that "[I]t shall be the duty of all carriers . . . and employees to exert every reasonable effort . . . to settle all disputes, . . . arising out of the application of . . . agreements" warrants the demand that such differences be first submitted to the very agency erected to resolve them. Cf. *Brotherhood of RR Trainmen* v. *Chicago R. & I. RR*, 353 US 30, 34-39 (1956); *Gunther* v. *San Diego & A.E. Ry.*, 34 U.S.L. Week 4058 (U.S. Dec. 8, 1965).

The imposition of this condition was, seemingly, foreshadowed by *Pennsylvania RR* v. *Day*, 360 US 548 (1959),

where the Court held that the Railroad Adjustment Board had exclusive primary jurisdiction over a retired railroad employee's complaint arising under a collective bargaining agreement. This is the trend of relevant Federal decisional law: that disputes rooted in a collective bargaining agreement should be brought to the Board for resolution before resort to the courts. National uniformity in decision and expertness in understanding the problems are among the advantages urging the preference. *Union Pacific RR* v. *Price*, 360 US 601 (1959); see also *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F2d 342, 343 (3 Cir. 1960).

The need and place of the Board are pointedly exampled now. The rightfulness of Walter's discharge depends upon the method of calculating the time stipulated by the collective agreement within which he had to "return to active service" to avoid forfeiture of seniority. According to his computation his return was punctual, under the railroad's reckoning he was too late. Thus not only is there a need for uniformity in interpretation here, but the determination of the controversy calls for railroad-labor knowledgeability, something possessed in the highest degree by the Adjustment Board. See *Gunther* v. *San Diego & A.E. Ry.*, *supra*, 34 U.S.L. Week 4058 (Dec. 8, 1965).

Letters in the record reveal that the railroad asked the attitude of the union upon the railroad's action in respect to Walker. In response the union expressed approval and suggested that "the matter rest as it is". From this, counsel for Walker argues that remand of his claim to the contract grievance processes would be unfair, since it has thus already been rejected by both the railroad and the union, who are responsible for and supervise the prosecution of these remedies. Notwithstanding, we cannot anticipate that the union will not fulfill any obligation it may have under the

duty of fair representation owed to Walker under the collective bargaining agreement. At all events, Walker should give the union an "opportunity to act on his behalf." *Republic Steel Corp.* v. *Maddox, supra,* 379 US at 653.

"If the union refuses to press or only perfunctorily presses the individual's claim," he has his remedies as the Court intimates in *Maddox,* 379 US at 652. Among others, he may himself follow through on the intramural steps and the Adjustment Board review just discussed. 45 USC 153(i); but cf. *Wade* v. *Southern Pacific Co.,* 243 F Supp. 307 (S.D. Texas 1965). If the time limitations of the internal remedies are interposed to preclude a hearing, the fairness of their application could also be tested before the Board.

Consequently, the judgment on appeal should be vacated and the action returned to the District Court for dismissal. Each party will bear his and its costs here.

Vacated and remanded for dismissal.